BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES ALLEN ROELFS	)	
Claimant	)	
	)	
VS.	)	
	)	
KANSAS HIGHWAY PATROL	)	
Respondent	)	Docket No. 1,020,624
	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the April 20, 2009 Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on August 11, 2009.

APPEARANCES

Gary Peterson, of Topeka, Kansas, appeared for the claimant. Richard L. Friedeman, of Great Bend, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties agreed that the 17.5 percent functional impairment assigned by the ALJ is appropriate (assuming claimant's claim is ultimately found compensable). The parties also agreed that in the event this claim is found compensable, that permanent partial general (work) disability is not at issue at this time as claimant is presently earning a comparable wage and is presently not qualified for a work disability under K.S.A. 44-510e(a). Accordingly, the parties agree that that portion of the ALJ's Award which found a task loss should be set aside, to be determined at some point in the future if and when there is a Request for a Review and Modification.

ISSUES

The ALJ found the claimant sustained his burden of proving personal injury by accident arising out of and in the course of his employment with respondent and awarded claimant a 17.5 percent impairment of function to the body as a whole for his hip injury. The ALJ denied claimant's request for a $25.00 increase in his average weekly wage as he felt the claimant failed to sustain his burden of proof that room and board were furnished as part of the wages paid to him during his training at the police academy.

Respondent argues that the claimant's hip injury did not arise out of and in the course of his employment by accident on the date alleged. Respondent also maintains that even if a work-related accident is proven, claimant failed to give notice of this hip injury. Therefore, claimant should not be entitled to compensation and the Award should be reversed.

The respondent requests review of the underlying compensability of his claim, including timely notice, injury by accident and arising out of and in the course of employment.

Claimant has appealed as well on the sole issue of his average weekly wage. Claimant contends his average weekly wage should be increased by $25.00 to account for the board and lodging compensation that he lost as a result of his hip injury and requests that all other issues be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the findings and conclusions of the ALJ as its own as if specifically set forth herein except as hereinafter noted.

After reviewing the entire record, the ALJ summarized his conclusions as follows:

> During, and as a result of strenuous physical exercise inherent in training to be a Kansas Highway Patrolman, [c]laimant suffered a non-displaced stress fracture in his right femur. Despite a mistaken diagnosis of a groin strain and a subsequent significant reduction in weight-bearing physical activities, [c]laimant remained symptomatic and ultimately suffered a complete displaced fracture of the femur. The fracture occurred as a direct and natural consequence of the original stress fracture. As a result of the fracture, [c]laimant ultimately required a total left hip

> replacement, and has suffered a 17.5% impairment of function to the body as a whole. Room and board furnished to [c]laimant during training, but not as part of his wages, were not included in computation of [c]laimant's pre-injury gross average weekly wage as "additional compensation."[1]

Earlier in his Award the ALJ concluded that claimant demonstrated "just cause" for his failure to notify respondent of his accident within 10 days of his non-displaced stress fracture. The ALJ believed this fracture was suffered at some point before February 8, 2004, and although claimant says he told *someone* of his ongoing hip pain, the ALJ concluded claimant had not given the requisite notice within 10 days. Nevertheless, the ALJ was persuaded that no one, including the claimant's physician, knew claimant had suffered this stress fracture until after the stress fracture progressed into a displaced fracture on February 28, 2004. A report of injury was completed on March 1, 2004 and Dr. Vosburgh wrote to respondent on March 9, 2004[2] and because both of these are within the 75 day period set forth in K.S.A. 44-520, he found claimant's notification was timely.

Respondent takes issue with the ALJ's findings as to timely notice and whether claimant's accidental injury arose out of and in the course of his employment. These arguments stem from the undisputed fact that claimant reports two separate instances where he noticed pain in his hip.

These two instances happened on the weekend while claimant was not actively engaged in the physical training to be a trooper. The first occurred on February 8, 2004 when claimant was running on a treadmill. Claimant had experienced pain in the upper leg and groin before February 8, 2004 and had expressed general pain complaints to others within the upper echelons at trooper training. Nonetheless, he continued his training activities. But on February 8, 2004, the pain was acute and caused him to alter his activities for the balance of the weekend.

When he returned to his training on February 10, 2004 he presented a note to Lieutenant Gassman. From that point forward claimant says he continued to perform all aspects of his training, except for running. This included marching with his group and going up and down stairs. Claimant continued to experience problems and sought an evaluation from a physician friend, Dr. Patricia Patrinely. Dr. Patrinely advised claimant to avoid weight bearing activities. This note was given to a supervisor and claimant was allowed to ride a stationary bike as part of his training. He continued all other physical activities and according to claimant, others had to help him carry his books. He eventually was using crutches to ambulate, a fact that is borne out by testimony of some of the instructors at the trooper academy.

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[1] ALJ Award (Apr. 20, 2009) at 12-13.

[2] Respondent concedes notice was given on March 1, 2004.

Then on February 28, 2004, when claimant was again away from the academy, he was at a friend's home and stepped out of a doorway, stepping down and felt a snap in his leg. He sought immediate medical treatment and was diagnosed with a displaced fracture of his left femur.

Based upon the fact that these two events occurred during periods of time when claimant was not actively in training, respondent denied that claimant's injury arose out of and in the course of his employment. Failing that argument, respondent also uses these facts to deny that claimant gave timely notice of any injury or that he sustained a series of repetitive injuries.

The Board has reviewed the entire record and concludes that the ALJ's Award should be affirmed on the issues of timely notice and arising out of and in the course of claimant's employment. Like the ALJ, the Board rejects respondent's contentions that claimant sustained two discrete injuries, both on his own time and outside his work activities. The greater weight of the medical testimony supports the ALJ's findings that claimant's stress fracture happened sometime before February 8, 2004 during his physical training at the trooper academy and was aggravated by his subsequent activities.

Claimant noticed symptoms in his groin and leg but this was during a period of increased physical activity. Trooper training began in January 2004 and in early February claimant began to notice pain in his leg and groin. Respondent's witnesses confirmed that the recruits, including claimant, were generally voicing physical complaints during their physical activity. Under these circumstances it is not surprising that claimant would not be able to identify a serious injury. And while he was driving in a car on February 6 he noted an increase in pain in his left hip. Then, the next day while running on a treadmill the pain increased significantly. When that pain did not subside during the next week's training, which included physical activities (although probably not running) he sought medical advice.

Dr. Patrinely, claimant's personal physician and the first medical practitioner to see claimant during this time, testified that claimant sustained a stress fracture to his femur while running during his training. Running was new to claimant and given the nature of running as well as the balance of his trooper training, she concluded that his training was the source of the stress fracture. She went on to testify that the subsequent step on February 28, 2004 caused the ultimate displacement of that fracture. Normally, just a step would not cause a displaced fracture. But given the existence of claimant's stress fracture, an injury that is caused by repetitive motion or activity, that area of the bone was weakened and became displaced.

Dr. Edward Prostic's testimony generally mirrors that of Dr. Patrinely. In fact, he testified that the treadmill event was far less damaging than the daily calisthenics claimant

was required to perform during his trooper training.[3] Likewise, Dr. Craig Vosburgh, the orthopaedic surgeon, testified that claimant's increased running activities caused his stress fracture, putting the scenario in motion such that the step down on February 28, 2004 caused the fracture to displace.

Only Dr. Stein believes the event while running on the treadmill constituted a "major aggravation"[4] and is the sole source of claimant's hip complaints. But as noted by the ALJ, this finding ignores the claimant's ongoing complaints of pain before he was running on the treadmill and while he was merely riding in a car. As of February 7, 2004, claimant had already undergone several weeks of rather rigorous training, running as much as 1-1/2 miles a day and marching along with other physical training activities.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[5] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[6]

K.S.A. 44-520 provides that while notice is generally required to be made within 10 days of the date of accident, that period may be extended to 75 days from the date of accident if claimant's failure to notify respondent under the statute was due to just cause. In considering whether just cause exists, the Board has listed several factors which must be considered:

(1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.

(2) Whether the employee is aware he or she has sustained an accident or an injury on the job.

(3) The nature and history of claimant's symptoms.

(4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident and whether the respondent had posted notice as required by K.A.R. 51-13-1.

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[3] Prostic Depo. at 8.

[4] Stein Depo. at 10-11.

[5] K.S.A. 44-501(a).

[6] K.S.A. 44-508(g).

Like the ALJ, the Board is persuaded that claimant suffered a stress fracture at some point before February 7, 2004. But it is clear from this record claimant did not know that he had suffered such a fracture, only that he had increasing complaints of left hip pain. The event while running on February 8, 2004 did not cause his stress fracture but only caused his symptoms to re-emerge. He continued his training and on February 28, 2004, he suffered an acute displacement of his fracture.

As noted by the ALJ, "[w]hen a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of the employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury."[7] Once claimant suffered the stress fracture during his trooper training, everything that followed as a result of that fracture is compensable. The fact that claimant describes two events that occurred during his none-training hours does not, based on this record, validate respondent's contentions in this matter. The Board affirms the ALJ's finding that claimant's accidental injury arose out of and in the course of his employment with respondent.

Likewise, the Board finds the ALJ's reasoning with respect to notice and the evidence of "just cause" for the delay in providing notice should be affirmed. Claimant did not know he had a stress fracture. In fact, it took some time to identify it once he began seeking treatment. And his situation was further complicated by the fact that he was continuing to undergo physical training rather than allowing his body to heal. Once the displaced fracture occurred and was diagnosed, claimant notified respondent, an accident report was completed and Dr. Vosburgh contacted respondent and advised of his condition and diagnosis. Under these facts and circumstances the Board finds there was "just cause" for the delay. Thus, claimant's notification was timely under K.S.A. 44-520.

Finally, claimant asserts that the ALJ erroneously failed to include an additional $25 in the computation of average weekly wage. Claimant maintains that under K.S.A. 44-511 the value of his room and board should be considered "additional compensation". That statute defines "additional compensation" as:

> (2) . . . "additional compensation" shall include and mean only the following: . . . (C) board and lodging when furnished by the employer as part of the wages, which shall be valued at a maximum of $25 per week for board and lodging combined, unless the value has been fixed otherwise by the employer and employee prior to the date of the accident, or unless a higher weekly value is proven.[8]

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[7] ALJ Award (Apr. 20, 2009) at 11, citing *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[8] K.S.A. 44-511(a)(2).

Respondent contends that room and board, which was furnished to the trooper recruits was not part of the wages but were an accommodation to the recruits to allow them to remain on site and not have to commute to and from the training site. The ALJ noted that there was no evidence that recruits were compelled to stay at the facility but the record does indicate that training began at 5:30 a.m. and went on all day. Claimant resided in Osawkie, Kansas and could not have realistically attended the training camp while driving back and forth each day. Indeed, it appeared the other officers who served as training mentors and teachers stayed on campus during their assignments. But there is no evidence that claimant or other recruits were required to stay at the site overnight, nor is there any evidence that room and board was considered part of their wages. Absent that evidence, the Board is compelled to affirm the ALJ's finding and deny claimant's request to increase the pre-injury average weekly wage by $25 per week.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated April 20, 2009, is affirmed in every respect except that the ALJ's finding with respect to task loss is set aside, pursuant to the parties' agreement.

IT IS SO ORDERED.

Dated this _____ day of September 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

CONCURRING AND DISSENTING OPINION

We would include the $25 representing room and board in claimant's average weekly. That room and board comprised an economic benefit to claimant that he would not otherwise have received. Accordingly, it should be included in computing his average weekly wage as provided by K.S.A. 44-511(a)(2)(C).

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BOARD MEMBER

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BOARD MEMBER

c: Gary Peterson, Attorney for Claimant
Richard L. Friedeman, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge